

STATE OF MINNESOTA

DISTRICT COURT

In re: Source Code Evidentiary Hearings in
Implied Consent Matters

Consolidated File No. 70-CV-09-19459

In re: Source Code Evidentiary Hearings in
Criminal Matters

Consolidated File No. 70-CR-09-19749

**ORDER 13 – AMENDED
SCHEDULING ORDER,
ORDER FOR PRODUCTION
OF EPROMs, AND DENIAL OF
MOTION FOR INJUNCTION OR
PRESERVATION ORDER**

This matter came before the undersigned on August 3, 2010 at the Scott County Justice Center, Shakopee, Minnesota pursuant to July 13, 2010 and July 26, 2010 Orders of the Court setting the parties' motions for hearing. These matters came before the Court for resolution of five motions brought by several Liaison Counsel for interested parties.

These matters were specially assigned to the undersigned by Chief Justice Eric J. Magnuson's January 11, 2010 Order, A09-2109 (hereinafter "Statewide Assignment Order"). Following assignment of these matters, this Court issued two Case Management Orders; one applying to criminal matters and one applying to implied consent matters. Each of these Case Management Orders designated Liaison Counsel who would perform certain duties with respect to identifiable groups interested in these proceedings. Following several changes to the original assignments, the Liaison Counsel at the time of the hearing are listed below:

Prosecutors	Defendants	Petitioners	Minnesota Commissioner of Public Safety
Bill Lemmons Sean McCarthy Pam Converse Mark Schneider David Kendall William Bernard	Charles Ramsay Jeff Sheridan Marsh Halberg Lee Orwig Derek Patrin Pam King Steve Holmgren	Charles Ramsay Jeff Sheridan Marsh Halberg Lee Orwig Derek Patrin	Kristi Nielsen

Liaison Counsel for the criminal defendants and implied consent petitioners in these matters have divided themselves into three identifiable groups; the Source Code Coalition (hereinafter the "Coalition"); the Patrin Group; and the Minnesota State Public Defenders.¹ The Commissioner of Public Safety is being represented by Kristi Nielsen with the Minnesota Attorney General's Office while the prosecutors have so far acted as a discrete group.

The appearances at the hearing on August 3, 2010 were noted as follows: William Bernard and Pamela Converse, appeared as Liaison Counsel for the Prosecutors. Thomas Donely, prosecutor for the City of Apple Valley, also appeared. Jeff Sheridan, Charles Ramsay, Marsh Halberg, Lee Orwig, and Derek Patrin appeared as Liaison Counsel for the Defendants and Petitioners. Pamela King appeared as Liaison Counsel for the Defendants. Kristi Nielsen, Assistant Attorney General, appeared as Liaison Counsel for the Commissioner of Public Safety. David Voigt, Deputy Attorney General, also appeared on behalf of the Commissioner of Public Safety. Also attending but not formally appearing was David M. Aafedt, counsel for CMI, Inc. of Kentucky.

¹ Marsh Halberg, Jeff Sheridan, Charles Ramsay, and Lee Orwig are liaising on behalf of the Coalition. Derek Patrin is liaising on behalf of the Patrin Group. Steve Holmgren and Pam King, both public defenders, are liaising on behalf of the Minnesota State Public Defender's group which is involved solely in the criminal matters.

The Coalition noticed four motions for hearing. At the hearing, the Coalition withdrew one its discovery motion indicating the parties had reached an agreement which resolved or would soon resolve the matter. The Commissioner of Public Safety noticed a fifth motion concerning discovery but also withdrew it by indicating the parties expected the issue was or would soon be resolved. In accordance with the parties' requests, the Court has limited its consideration to the three remaining motions.

The first motion brought by the Coalition was a motion to preserve evidence through issuance of an injunction "preventing the State of Minnesota and its agents from altering, destroying, or failing to preserve any component or element of the Minnesota Intoxilyzer 5000ENs, including, but not limited to software, source code, and EPROMs, and any and all documentation and other evidence associated with Minnesota's breath testing program." This motion was opposed by a Memorandum submitted by Liaison Counsel William Bernard with which Liaison Counsel Mark Schneider, Pamela Converse, and Kristi Nielsen also supported.

The Coalition's second motion was in the nature of one to compel certain discovery. The Coalition sought to force the State of Minnesota to provide fourteen sets of master and slave EPROMs from Intoxilyzer 5000EN machines in use in Minnesota. Twelve of these sets would come from a sampling of Intoxilyzer 5000EN machines in use in Minnesota; six in the metro area and six in outstate Minnesota. The thirteenth set would be an identical copy to the EPROM sets used to replace the twelve produced. Finally, the fourteenth set would be the master and slave EPROMs from Instrument Number 3674 which was previously in use in Otter Tail County, Minnesota. The

Commissioner of Public Safety opposed this motion in its entirety. Liaison Counsel Pamela Converse joined in the Commissioner's opposition.

The Coalition's final motion was a second motion to amend the Court ordered schedule. Specifically, the Coalition sought additional time for the experts reviewing the Intoxilyzer 5000EN source code to produce a report. The Court previously heard and granted a motion by the Coalition to modify the schedule on June 16, 2010. The Coalition requested additional time due to issues which have arisen since June 16, 2010. This request for additional time was joined and supported via letter by the Minnesota State Public Defenders and the Patrin Group. The Commissioner of Public Safety opposed the Coalition's request and was joined by Liaison Counsel Pamela Converse in his opposition.

All parties and counsel, including non-Liaison Counsel, involved in these matters were invited by the Court's July 26, 2010 Order to submit a letter or accompanying motion supporting or objecting to any of the issues raised by these motions. Despite this invitation, the Court did not receive any submissions other than the positions and arguments of Liaison Counsel outlined above. Based upon the arguments, the proceedings in these actions, and the entire record before it, the Court hereby makes the following:

ORDER

1. The motion requesting an injunction pursuant to Rule 65.02 of the Minnesota Rules of Civil Procedure or an order pursuant to Rule 9.01, subdivision 2 of the Minnesota Rules of Criminal procedure for the "preservation of evidence" is denied. However, the State of Minnesota, Commissioner of Public Safety, and Minnesota Bureau of

Criminal Apprehension shall continue to follow applicable law regarding preservation of evidence relevant to these proceedings or that is exculpatory in nature as shall all units of law enforcement whose use of results from an Intoxilyzer 5000EN are involved in this consolidated proceeding. This shall include, at a minimum, retention of the Intoxilyzer 5000EN instruments and any records documenting changes to, usage of, or maintenance on those machines.

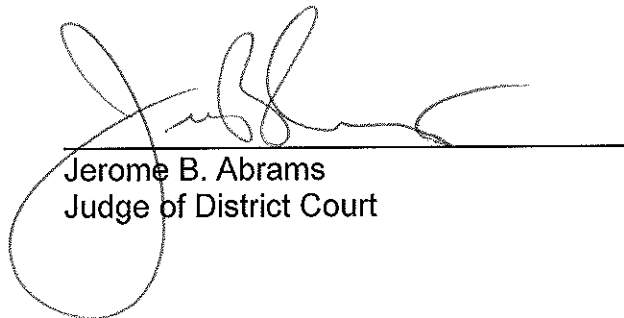
2. The motion for compelled production of master and slave erasable programmable read only memory (EPROM) installed within the Intoxilyzer 5000EN instruments in use in the state of Minnesota and in Instrument Number 3674 is granted in part and denied in part. The Commissioner of Public Safety shall produce a total of three master and slave EPROM sets. One of the produced master and slave EPROM sets shall be from an Intoxilyzer 5000EN instrument which is in use in the First, Second, Fourth, or Tenth judicial districts. The second EPROM set shall be from an Intoxilyzer 5000EN instrument which is in use in one of the other judicial districts in the State of Minnesota. The parties shall work together to select the two instruments from which these EPROM sets shall be produced. The third EPROM set shall be from Instrument Number 3674 which was previously in use in Otter Tail County between July, 2008 and February, 2009. The Commissioner may produce either an exact copy of the EPROM sets or the actual EPROM set in use in the identified instruments.
3. The motion for an amended scheduling order giving the experts retained by the Coalition additional time to prepare their expert report is granted. The amended schedule shall be:

October 1, 2010	Petitioner's/Defendant's Expert Disclosures
October 1, 2010	Non Expert Discovery Ends
October 1, 2010	Final Date for Adding Cases to Consolidation
November 15, 2010	State/Prosecution Expert Disclosures
November 15, 2010	Expert Discovery/Depositions (if any) begins
November 15, 2010	All Non Source Code Issues Completed in Consolidated Cases
December 7, 2010	Expert Discovery Ends
December 8, 2010	Final Hearing

4. The attached memorandum is incorporated herein by reference.

Dated: August 11, 2010

BY THE COURT:


Jerome B. Abrams
Judge of District Court

MEMORANDUM

The motions presented to the Court for decision arise largely from two events which recently occurred during the analysis of the Intoxilyzer 5000EN source code by the Coalition's experts. On or about June 15, 2010 and in the course of their analysis, the Coalition's experts identified "additional text" (AT) or "additional text code" (ATC)² on the slave erasable programmable read only memory (EPROM) they obtained from Intoxilyzer Instrument Number 612, the instrument they are leasing from the State of Minnesota. This AT or ATC was not present on the slave EPROM they had received from CMI, Inc. during their review in Kentucky. The Coalition believes this AT or ATC may have an operational interaction with the other code on the slave EPROM through the "buffer overflow." The expert retained by the Commissioner does not believe it is possible for the AT or ATC to have any operational effect on the slave EPROM's code operations. At this point, the parties' experts are relying largely upon theory and have not had the opportunity to fully investigate the issue. The parties have, however, identified at least one Intoxilyzer 5000EN, Instrument Number 3674, which was previously used in Otter Tail County, Minnesota as one which may have the same AT or ATC as Instrument Number 612.

From the discovery of the AT or ATC on Instruments Numbered 612 and 3674, the Coalition has formulated the question as to which instruments in use in Minnesota contain the AT or ATC. The Commissioner of Public Safety does not have specific

² The Coalition, based upon the recommendation of their experts, characterizes this specific information contained on the slave EPROM as additional text code (ATC) because they believe it has functional interplay with the remainder of the code on the slave EPROM. The Commissioner of Public Safety, based upon the recommendation of his experts, characterizes this information as additional text (AT) because of his assertion that there is no functional interplay. The Coalition classifies the information as operational code while the Commissioner classifies the information as non-operational filler text. There is no basis at the present time to conclude if either characterization is correct.

records which would reflect whether or when the slave EPROM code versions which include the AT or ATC were placed into operation in any one of the approximately 264 Intoxilyzer 5000EN instruments in use throughout the State of Minnesota. Consequently, the Coalition seeks production of fourteen master and slave EPROM sets.

The other event occurred at the end of June or early in July of 2010. The source code for the EPROMs which was provided by CMI, Inc. for the parties' expert review was supposed to be identical in all respects to the EPROMs in use in Minnesota's Intoxilyzer's. Apparently, two additional files³ were provided by CMI, Inc. in the slave EPROM source code made available for review by the Coalition's experts which were not included in the slave EPROM source code on most of the Intoxilyzer 5000EN instruments in use in Minnesota. This purportedly inadvertent error has led to a one and a half to two week delay in the Coalition's review of the Intoxilyzer 5000EN source code.

Motion for Injunction and Preservation Order

These events have led to a concern by the Coalition, which is not shared by the Court, that some component or element of the Minnesota Intoxilyzer 5000EN instrument fleet, software, or records will be altered, destroyed, or otherwise not preserved by the State. However, the Coalition has not identified a specific piece of hardware, version of software, or record with which they are concerned. Rather, the Coalition's request is for a general order which broadly requires the State of Minnesota to keep everything that has any conceivable relationship to Minnesota's Intoxilyzer 5000EN instruments in a

³ Not unlike the characterizations of AT and ATC, the State contends these are two lines of additional code while the Coalition claims they are two additional files.

veritable stasis. Such a request does not acknowledge the fact that these instruments are currently in use in the State of Minnesota and will continue to be used until at least the fall of this year when the Commissioner expects to begin replacing the Intoxilyzer 5000EN with the State's next breath testing instrument. It also fails to recognize the Commissioner's expressed intent to retain the hardware and software as the instruments are taken out of service and to document any ongoing changes made while the instruments are in use. The Commissioner of Public Safety and the prosecutors in this case are aware of their obligation to preserve and disclose exculpatory and relevant information and to provide discovery consistent with the obligations under applicable rules. With these general assurances in place, lack of a specific issue, and no history of problems with preservation or disclosure, the Court declines to exercise its discretion to issue the order requested by the Coalition.

Production of EPROM Sets

The Coalition has also requested fourteen master and slave EPROM sets. This request arises out of the discovery of the AT or ATC and the inability to readily determine whether the AT or ATC is present on any of the other Intoxilyzer 5000EN instruments operating in the State of Minnesota. The Coalition has leased Instrument Number 612 from the State of Minnesota and, as part of their analysis of the source code, reviewed the information on the slave EPROM. In doing so, the Coalition discovered information that the parties are calling AT or ATC. The Coalition's theory is that this AT or ATC has an operational interaction with the other operational code within the device. If this theory is correct, then the Coalition believes the interaction of the AT or ATC may ultimately affect the reliability or accuracy of the reported blood alcohol

concentration (BAC) result. Although the Coalition has not yet demonstrated evidence supporting its theory, and in fact the Commissioner of Public Safety proposes the completely opposite theory, the Coalition is looking ahead to how their theory could be traced from the instrument they have leased to all of the other instruments in use across the State.

The Coalition is conducting their analysis on the leased instrument and source code provided by CMI, Inc. To show that their theory regarding the AT or ATC applies to other instruments across the State of Minnesota, the Coalition would need to show the AT or ATC is also present on those other instruments. The Coalition is requesting the compelled discovery of a sampling of twelve master and slave EPROM sets from instruments in use across the State and a thirteenth replacement EPROM set. From these instruments, the Coalition could then establish the presence, absence, or rate thereof of the AT or ATC in instruments used across the State. The Commissioner of Public Safety objects to the compelled production of these EPROMs on the grounds that it is not yet necessary because the Coalition has not made the leap from the theoretical to the actual, i.e. whether the AT or ATC has any effect at all on the operation of the device.

Under Rule 26.02(a) of the Minnesota Rules of Civil Procedure, a party may have discovery “regarding any matter, not privileged, that is relevant to a claim or defense of any party” and so long as “the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” The requested discovery may be limited if it is unreasonably cumulative or duplicative or the burden outweighs the likely benefit. Minn. R. Civ. P. 26.02(b)(3). Under Rule 9.01, subdivision 2(3) of the Minnesota Rules of

Criminal Procedure, information which is not subject to mandatory disclosure may be had by a defendant upon "a showing [] that the information may relate to the guilt or innocence of the defendant or negate guilt or reduce the culpability of the defendant as to the offense charged." When a party seeks discovery under these rules, the trial court must exercise its discretion to determine what discovery should be had given the specific circumstances of each case. State v. Underdahl, 767 N.W.2d 677, 684 (Minn. 2009); Shetka v. Kueppers, Kueppers, Von Feldt and Salmen, 454 N.W.2d 916, 921 (Minn. 1990) (stating "[u]ndoubtedly, the trial judge has wide discretion to issue discovery orders and, absent clear abuse of that discretion, normally its order with respect thereto will not be disturbed"), quoted by In re Commissioner of Public Safety, 735 N.W.2d 706, 711 (Minn. 2007); Abbott v. Commissioner of Public Safety, 760 N.W.2d 920, 924-26 (Minn. App. 2009) (comparing discovery in implied consent cases with other civil cases); Connolly v. Commissioner of Public Safety, 373 N.W.2d 352, 354 (Minn. App. 1985) (stating "trial court has broad discretion in granting or denying discovery requests"), cited with approval by Erickson v. MacArthur, 414 N.W.2d 406, 407 (Minn. 1987).

In this case, the Coalition has presented a theory upon which the existence of AT or ATC upon the EPROMs in the instruments utilized throughout the State of Minnesota may be relevant. The Coalition's experts have not collected evidence which would demonstrate their theory results in a practical application. However, making the Coalition establish all of the evidence providing for a leap from the theoretical to the practical could result in serial discovery and a longer extension of the time for resolution of this proceeding. The Court is also mindful that the opposition by the Commissioner

of Public Safety to the Coalition's theory will likely continue and resolution of the dispute over whether the Coalition's theory is borne out in reality may require the final contested hearing contemplated by the Statewide Assignment Order.

With these considerations in mind and upon the record before this Court, the production of twelve master and slave EPROMs from across the State is not necessary. However, the Coalition should have an opportunity to investigate the existence of the AT or ATC upon two instruments within the two major regions of the State as identified by the Coalition. This will provide the Coalition with an opportunity to collect evidence supporting their theory while also allowing them to investigate in a narrowly targeted fashion whether other instruments within the State even contain the AT or ATC. Furthermore, the interests of the petitioners and defendants in the underlying proceedings are further protected by the offer of the Commissioner of Public Safety and the BCA. The Commissioner and BCA have volunteered to assist in further investigation of the State's Intoxilyzer EPROMs if the Coalition can demonstrate their theory has an actual effect on the instrument within their possession, Instrument Number 612. A limited production of EPROMs is therefore appropriate.

The Coalition has not established a reason for compelled production of a master and slave EPROM set installed in place of those which may be removed for investigation of the presence or absence of the AT or ACT. Presumably, the substituted EPROMs would be identical to those removed or otherwise already within the Coalition's possession from CMI, Inc. Providing an additional copy does nothing more than create redundant discovery and unnecessarily generate further delay. As such, the request is denied.

The master and slave EPROM set housed within Instrument Number 3674 should also be provided to the Coalition. Through discovery the Commissioner of Public Safety notified the Coalition that the checksum values for Instrument Number 3674 were different than the other instruments used in the State. The difference in checksum values indicates the slave EPROM that was in Instrument Number 3674 has a different amount of information on it. CMI, Inc. directly burned the code onto the slave EPROM for Instrument Number 3674 whereas the instruments in the rest of the State were burned by the BCA. The nature of the difference in information on Instrument Number 3674's slave EPROM is something which may be relevant not only to tests performed on that instrument but also on the differences between how code was burned onto EPROMs by the BCA and CMI, Inc. This information is therefore relevant, likely to lead to the discovery of admissible evidence, or potentially exculpatory evidence and therefore discoverable

Amendment of Schedule

In this case, the Court has to balance a multitude of important interests. At this time, there are approximately 3000 cases which have been assigned to this Court for resolution pursuant to the Statewide Assignment Order. There are an additional 500 to 1000 cases of which the Court is aware of a request for assignment but for which the necessary procedural steps are still being completed. The Intoxilyzer 5000EN will also be in use in Minnesota until at least the spring of 2011 which can continue to give rise to additional cases. These litigants have an interest in the prompt resolution of their cases. Some litigants have significant potential consequences which hinge at least in part upon resolution of these matters. Without some resolution, these litigants continue

to live their lives in limbo.

The public also has an interest in a just and speedy resolution of these matters. The Commissioner of Public Safety, acting upon the public's behalf, needs to be able to determine whether they can establish individuals drivers are or are subject to license revocation and take the steps allowed by law to address those issues. Likewise, prosecutors across the State need to know whether they can rely upon results obtained from an Intoxilyzer 5000EN in making prosecutorial decisions.

Minnesota's Judicial Branch also has an interest in having this backlog of cases resolved in an expeditious manner. Following resolution of the issue specified by the Statewide Assignment Order, these matters will return to the counties in which they originated. With shrinking budgets and substantial numbers of these cases in courts across the State, the significant backlog of cases created by this litigation poses its own set of unique challenges.

Balancing these considerations is everyone's interest in making sure the process is just and produces a result based upon complete and accurate information. This includes protecting the due process rights of defendants and providing litigants with adequate time for discovery. The third schedule as revised by the Court in this case provides such an adequate balance and directs the parties towards a necessary end to these proceedings.